IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MARIO JUAREZ SALDANA,

Petitioner,

vs. Case No. 2:09-cv-02786-JPM-cgc

UNITED STATES OF AMERICA

and

Marcell Mills, in his Official Capacity as
Warden of the West Tennessee Detention Facility,

Respondents.

MOTION TO DISMISS FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND SUPPORTING MEMORANDUM[1]

Pursuant to Fed. R. Civ. P. 7, respondents hereby move this Court for an order dismissing the First Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241. The

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[1] On December 7, 2009, petitioner filed an emergency motion to stay his extradition pending this Court's review of his petition for writ of habeas corpus, which at that time he had yet to file. The Court granted the stay for two hours to allow petitioner to file a petition, but ruled that the stay would be automatically lifted once he did so or when the two hours had expired, unless further extended by the Court. See United States v. Saldana, No. 2:09-mj-00014-tmp-1 (W.D. Tenn.), Dec. 7, 2009 Order. Petitioner filed this petition for writ of habeas corpus later on the same day, see Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 ("Petition"), and the court entered no extension of the stay. The United States sought, and was granted, an extension of time until December 30, 2009, within which to respond to the habeas petition. On December 23, 2009, petitioner filed a First Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 ("Amended Petition").

The United States respectfully requests that, for the reasons stated herein, the Court clarify that no stay is currently in effect and dismiss the habeas petition. The United States will refrain from extraditing petitioner pending the Court's clarification. If the Court indicates that the stay has been lifted and petitioner files a motion to renew the stay, the United States respectfully requests an opportunity to oppose any such motion.

reasons for this motion are set forth below.

INTRODUCTION

Petitioner faces extradition to Mexico on charges of aggravated murder and asks the Court to review the decision by the Secretary of State to surrender him to Mexico. To grant petitioner's request would be contrary to decades of precedent in numerous Circuits upholding the Rule of Non-Inquiry. Under this venerable doctrine, with its Constitutional underpinnings, extradition decisions by the Secretary of State are deemed unreviewable because they involve sensitive foreign policy matters that are the exclusive province of the Executive Branch. In other words, it is the role of the Secretary of State -- and not the courts -- to determine whether extradition should be denied, even if a fugitive claims he will be mistreated in the requesting country. In executing that role, the Secretary of State will not extradite if torture is more likely than not to occur.

The historic Rule of Non-Inquiry was recently bolstered by the Supreme Court in Munaf v. Geren, __ U.S. __, 128 S. Ct. 2207, 2218 (2008). There the Supreme Court held that the Judiciary should not second-guess the Executive's decision to surrender detainees where, as here, the Judiciary would thereby usurp the role of the political branches. The fact that the fugitives at issue in Munaf had been captured within the requesting country (Iraq) rather than the United States was not a factor in the decision, and the principles of Munaf govern this case.

Petitioner contends that regardless of the Rule of Non-Inquiry, he cannot be extradited because of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), to which the United States is a party. The CAT prohibits extradition where there are substantial grounds for believing torture will occur.

However, the Foreign Affairs Reform and Restructuring Act of 1998 ("the FARR Act"), which directs appropriate agencies to implement the CAT, expressly indicates that the FARR Act does not create jurisdiction for a court to review the Secretary's application of the CAT.

With the enactment of legislation in 2005, 8 U.S.C. § 1252(a)(4) ([part of] the "REAL ID Act"), Congress reaffirmed what the long-standing Rule of Non-Inquiry and the FARR Act had already established, i.e., that extradition decisions by the Secretary of State, including those that involve torture claims, are nonreviewable. The REAL ID Act unambiguously provides that jurisdiction over torture claims exists exclusively in the court of appeals in connection with certain immigration proceedings. In fact, the Act specifically singles out torture allegations raised in the habeas context as not constituting reviewable claims. This plain language can neither be disregarded nor rewritten, and it governs this case so as to preclude review.

It is important to state at the outset that the United States does not claim that the Secretary of State has a right to extradite petitioner to face torture. Under the Department's own regulations, the Secretary of State will not extradite a fugitive if she finds it is more likely than not that the fugitive will be tortured in the requesting country. This case is therefore not about whether the United States may extradite someone when it believes he is more likely than not to be tortured; it may not. The question before the Court is whether, despite repeated clear direction from Congress and the Supreme Court, and decades of precedent from courts around the country, the Judiciary may second-guess the extradition determinations made by the Secretary of State that are intertwined with sensitive foreign policy determinations and assessments. The answer to that question is no.

BACKGROUND

A. The Statutory Scheme Governing Extradition

Extradition is an Executive rather than a Judicial function, Hoxha v. Levi, 465 F.3d 554, 560 (3d Cir. 2006), and is a means by which a fugitive is returned to a foreign country to face criminal charges there. An extradition is initiated by a request from a foreign country to the United States Department of State, which, along with the Department of Justice, evaluates whether the request is within the scope of the applicable extradition treaty. Sidali v. INS, 107 F.3d 191, 194-95 (3d Cir. 1997); Declaration of Clifton M. Johnson ("Johnson Dec.") ¶ 2 (attached). Once found to be consistent with the applicable treaty and U.S. law, the request is sent to the U.S. Attorney in the district where the fugitive is located. Sidali v. INS, 107 F.3d at 194-95; Johnson Dec. ¶ 2. The U.S. Attorney then files a complaint in district court, seeking an arrest warrant for the fugitive. See Sidali v. INS, 107 F.3d at 194-95; Johnson Dec. ¶ 2.

Following the fugitive's arrest, a district judge or magistrate judge (depending on local practice) holds a hearing to determine whether (1) there is probable cause – i.e., "evidence sufficient to sustain the charge" – as to each offense for which extradition has been requested; (2) the offenses are encompassed by the relevant treaty; and (3) the person before the court is the person sought in the extradition request. 18 U.S.C. § 3184[2]; In Re Drayer, 190 F.3d 410, 415

[2] 18 U.S.C. § 3184 provides in pertinent part:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, . . . any justice or judge of the United States, or any magistrate judge . . . may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, . . . issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge,

(6th Cir. 1999), cert. denied, 528 U.S. 1176 (2000); Johnson Dec. ¶ 3. "'[I]f the evidence is sufficient to sustain the charge, the inquiring [judicial officer] is required to certify the individual as extraditable to the Secretary of State and to issue a warrant.'" Prasoprat v. Benov, 421 F.3d 1009, 1012 (9th Cir. 2005) (quoting Blaxland v. Commonwealth Dir. of Pub. Prosecutions, 323 F.3d 1198, 1207 (9th Cir. 2003)).

A judicial extradition certification is not appealable and is subject only to "limited" collateral review through the habeas corpus process. See Fernandez v. Phillips, 268 U.S. 311, 312 (1925); In Re Drayer, 190 F.3d at 415; Johnson Dec. ¶ 4. The district court's review of such an extradition order is confined to whether the extradition judge had jurisdiction, whether the offense charged was within the extradition treaty, and whether there was any evidence supporting the probable cause determination. In Re Drayer, 190 F.3d at 415; Johnson Dec. ¶ 3; see also Fernandez, 268 U.S. at 312; Sidali v. INS, 107 F.3d at 194-95; Shapiro v. Ferrandina, 478 F.2d 894, 901 (2nd Cir. 1973).

Following certification by the district court, the Secretary must decide whether to extradite the fugitive. The question whether the fugitive shall actually be surrendered to the custody of the requesting state is committed to the discretion of the Secretary of State. 18 U.S.C. § 3186; Johnson Dec. ¶ 4. The Secretary examines, inter alia, materials submitted by the fugitive, persons acting on his behalf, or other interested parties, and examines all relevant

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> to the end that the evidence of criminality may be heard and considered. . . . If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, . . . he shall certify the same . . . to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such persons . . . and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

materials that may come to her attention. Johnson Dec. ¶ 7. Section 3186 provides that "[t]he Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged." 18 U.S.C. § 3186 (emphasis added); United States v. Kin-Hong, 110 F.3d 103, 109 (1st Cir. 1997) (noting that it is "within the Secretary of State's sole discretion to determine whether or not the relator should actually be extradited").

The surrender of a fugitive to a foreign government is "purely a national act . . . performed through the Secretary of State," within the Executive's "powers to conduct foreign affairs." In re Kaine, 55 U.S. (14 How.) 103, 110, 14 L. Ed. 345 (1852); Blaxland, 323 F.3d at 1207 ("[E]xtradition is a diplomatic process carried out through the powers of the executive, not the judicial, branch."). Accordingly, the Secretary of State's decision whether to extradite a fugitive certified as extraditable has traditionally been treated as final and "not generally subject to judicial review." Escobedo v. United States, 623 F.2d 1098, 1105 (5th Cir. 1980). The nonjusticiability of the Secretary's decision in this context falls under the rubric of the "Rule of Non-Inquiry."

B. Munaf and The Rule of Non-Inquiry

In Munaf, the Court held that judicial review of the Executive's determination respecting the likelihood of torture if a fugitive is transferred would be improper. The Court explained that "[t]he Judiciary is not suited to second-guess such determinations – determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." Munaf, 128 S. Ct. at 2226 (citing The Federalist No. 42, p. 279 (J. Cooke ed. 1961) (J. Madison) ("If we are to be one nation in any

respect, it clearly ought to be in respect to other nations")). The Court stressed that, "[i]n contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." Id.; accord id. at 2225 ("Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments.").

Munaf stands for the same principles that underlie the general Rule of Non-Inquiry.[3] Under that Rule, "humanitarian considerations are within the purview of the executive branch and generally should not be addressed by the courts in deciding whether a petitioner is extraditable." Hoxha, 465 F.3d at 563. The Courts of Appeals have widely adhered to the Rule of Non-Inquiry. See, e.g., Kin-Hong, 110 F.3d at 110 ("The rule of non-inquiry, like extradition procedures generally, is shaped by concerns about institutional competence and by notions of separation of powers."); Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990) ("The interests of international comity are ill-served by requiring a foreign nation . . . to satisfy a United States

[3] Munaf involved the transfer to a foreign sovereign for prosecution of individuals alleged to have committed crimes and detained by U.S. military officials within the territory of that sovereign. The Supreme Court in Munaf concluded that those who commit crimes within a sovereign's territory may be transferred to that sovereign's government for prosecution. 128 S. Ct. at 2225. However, the fact that the individuals were detained within the territory of the foreign sovereign was not the basis for the decision, but rather, merely reinforced the Supreme Court's conclusion that those who commit crimes within a sovereign's territory may be transferred to the sovereign's government for prosecution. See generally id. at 2221-24. As the Court reasoned, "there is hardly an exception to that rule when the crime at issue is . . . unlawful insurgency directed against an ally during ongoing hostilities involving our troops." Id. at 2225. Thus, although Munaf is not technically an extradition decision, its principles apply with equal force to this case.

district judge concerning the fairness of its laws and the manner in which they are enforced."); Escobedo 623 F.2d at 1107 ("[T]he degree of risk is an issue that properly falls within the exclusive purview of the executive branch.") (citations and quotations omitted); but see Mironescu v. Costner, 480 F.3d 664, 670 (4th Cir. 2007), cert. dismissed, 128 S. Ct. 976 (2008) (holding that, while the Rule of Non-Inquiry does not bar habeas review of the Secretary's extradition decision, the FARR Act, Pub. L. 105-277, § 2242(d), 112 Stat. 2681, 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note), "flatly prohibits" courts from considering torture and FARR Act claims on habeas review).

Undergirding this Rule is the idea that "courts are ill-equipped as institutions and ill-advised as a matter of separation of powers and foreign relations policy to make inquiries into and pronouncements about the workings of foreign countries' justice systems." United States v. Smyth, 61 F.3d 711, 714 (9th Cir. 1995); see Munaf, 128 S. Ct. at 2226. Instead, "the State Department is in a superior position to consider the consequences of a nonextradition decision upon foreign relations than the courts and it has diplomatic tools, not available to the judiciary, which it can use to insure that the requesting state provides a fair trial." Smyth, 61 F.3d at 714 (internal quotation marks omitted); see Kin-Hong, 110 F.3d at 110-111. The Secretary of State's exercise of discretion regarding whether to extradite an individual "may be based not only on 'considerations individual to the person facing extradition' but 'may be based on foreign policy considerations instead.'" Prasoprat, 421 F.3d at 1016 (quoting Lopez-Smith, 121 F.3d at 1326); see Escobedo, 623 F.2d at 1105. Thus, as the courts have recognized, in determining whether or not to extradite a particular fugitive, the Secretary takes into account humanitarian claims and applicable statutes, treaties, or policies regarding appropriate treatment in the receiving country.

See Prasoprat, 421 F.3d at 1016; Ntakirutimana v. Reno, 184 F.3d 419, 430 (5th Cir. 1999).

C. The Convention Against Torture

Petitioner contends that despite the Rule of Non-Inquiry, he cannot be extradited in light of the CAT. The CAT was adopted by the United Nations General Assembly in 1984 and the United States became a party to the CAT in 1994. See S. Exec. Rep. No. 101-30, at 2 (1990). Article 3 of the CAT provides:

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.[4]
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

S. Treaty Doc. No. 100-20, at 20 (1988). The treaty entered into force for the United States on November 20, 1994. U.S. Dep't of State, Treaties in Force, 458 (2009); 22 C.F.R. § 95.1(a).

The Senate conditioned its approval of the CAT upon a Resolution of Ratification declaring that "Articles 1 through 16 of the Convention are not self-executing." 136 Cong. Rec. S17486-01, at S17492 (Oct. 27, 1990); see S. Exec. Rep. 101-30, at 31. The United States' ratification of the CAT therefore included a declaration that Articles 1 through 16 of the CAT are not self-executing. Auguste v. Ridge, 395 F.3d 123, 132 (3d Cir. 2005). The Executive Branch understood that to mean that the CAT itself would not create any judicially enforceable rights, including any right to judicial review of determinations made by the "competent authorities"

[4] Pursuant to an understanding in the Senate's resolution of ratification, the United States interprets the phrase "where there are substantial grounds for believing that he would be in danger of being subjected to torture" to mean "if it is more likely than not that he would be tortured." See S. Exec. Rep. 101-30, at 30; see Johnson Dec. ¶ 5.

under Article 3, and the Senate Foreign Relations Committee included that analysis in its report on the CAT:

> The reference in Article 3 to "competent authorities" appropriately refers in the United States to the competent administrative authorities who make the determination whether to extradite, expel, or return. . . . Because the Convention is not self-executing, the determinations of these authorities will not be subject to judicial review in domestic courts.

S. Exec. Rep. No. 101-30, at 17-18.

D. The FARR Act and Its Implementing Regulations

Congress passed the FARR Act in part to supply more detailed provisions for the implementation of Article 3 of the CAT. See Pub. L. 105-277, § 2242, 112 Stat. 2681, 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note). The FARR Act directed the heads of appropriate agencies to "prescribe regulations to implement the obligations of the United States under Article 3" of the CAT, subject to the understandings and other similar statements included in the Senate's resolution of ratification. Id. § 2242(b).

Of critical importance to this case, the FARR Act bars judicial review of the implementing regulations, and expressly states that it does not create jurisdiction for a court to review the Secretary of State's application of Article 3 of the CAT. It provides in pertinent part:

> Notwithstanding any other provision of law . . . no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal [in immigration cases under the Immigration and Nationality Act].

FARR Act, Section 2242(d) (emphasis added).

As required by the FARR Act, § 2242(b), the Department of State adopted regulations to

implement Article 3 of the CAT in the extradition context. See 22 C.F.R. §§ 95.1-95.4. These regulations provide that "the Secretary is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition." Id. § 95.2(b). In extradition cases where allegations regarding torture have been made, "appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant." Id. § 95.3(a). Thereafter, "[b]ased on the resulting analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions." Id. § 95.3(b). The regulations also provide that "[d]ecisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review." Id. § 95.4.

The State Department's decision-making process in extradition cases often raises sensitive issues when a fugitive makes torture claims. In assessing such claims, the Secretary may need to weigh conflicting evidence from various sources regarding the situation in the requesting country. See Johnson Dec. ¶¶ 6-7. She may need to decide whether to broach with foreign officials the often delicate question of possible mistreatment, and, if she does so, to assess which officials to approach and in what format to address them. See id. ¶ 12. The Secretary may also need to determine whether to seek assurances from the requesting country, and concomitantly, evaluate whether such assurances are likely to be reliable and credible. See id. ¶¶ 8-9. Those determinations can require expertise in a host of matters, including an understanding of the nature and structure of the requesting country's government and its degree of control over the various actors within its judicial system, an ability to predict how the country

is likely to act in light of its past assurances and behavior, and experience to evaluate whether confidential diplomacy or public pronouncements would best protect the safety of the fugitive. Id. ¶¶ 9-10. Such determinations are all inherently discretionary and are intrinsically within the power of the Executive to engage in highly sensitive foreign relations.

In sum, before deciding whether or not to actually direct petitioner's surrender to the Mexico, the Department of State was required by its regulations to investigate and analyze a variety of facts and considerations, including humanitarian concerns. The Department of State also had to determine, based on those facts and considerations, whether or not to engage in sensitive diplomatic communications and actions regarding possible assurances of proper treatment from Mexico.

E. The REAL ID Act

In 2005 Congress enacted 8 U.S.C. § 1252(a)(4) as part of the REAL ID Act. This statute provides that the sole and exclusive means for judicial review of CAT claims, as allowed under the FARR Act, shall be in a petition for review of a removal order filed in the court of appeals in an immigration case. It states as follows:

> Judicial review of orders of removal
> * * * *
> (4) Claims under the United Nations Convention
> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section."

8 U.S.C. § 1252(a)(4) ("REAL ID Act") (emphasis added).

Thus, the REAL ID Act provides that, notwithstanding any other provision of statutory or nonstatutory law, including habeas law, review of removal orders in the court of appeals is the sole means of judicial review of any CAT claim. These limitations are not confined to the immigration context. In other words, courts have no jurisdiction to consider CAT claims except in the circumstances described (with one inapplicable exception in subsection (e)), i.e., in the context of review of an immigration removal order in the court of appeals.

F. The Extradition Request for Petitioner Mario Juarez Saldana

Pursuant to the Extradition Treaty between the United States of America and the United Mexican States, U.S.-Mex., May 4, 1978, 31 U.S.T. 5059, as amended by the Protocol to the Extradition Treaty Between the United States of America and the United Mexican States of May 4, 1978, U.S.-Mex., Nov. 13, 1997, S. Treaty Doc. No. 105-46 (1998), the Government of Mexico seeks petitioner's extradition to face criminal charges in Mexico in connection with the 1997 aggravated homicide of Thomas Martinez Parra. The charges allege that petitioner was in his own neighborhood among people who knew him, that he was visibly drunk and carrying a .22 caliber rifle and a pistol, and that he was bantering with and threatening Parra. Petitioner then allegedly shot Parra, who identified petitioner as his killer before dying from complications of the gunshot wound.

Based upon the Mexican request, the United States obtained a warrant and petitioner was arrested by the U.S. Marshal Service on May 21, 2009. He has been detained to date. After numerous prehearing motions, the U.S. Magistrate Judge conducted an extradition hearing on September 9, 2009. Petitioner did not challenge the fact that he was at the scene, but did

introduce evidence on his own behalf. On October 8, 2009, the Magistrate Judge issued an order certifying extradition and committing petitioner to the custody of the U.S. Marshal pending further decision by the Department of State as to extradition and surrender. 18 U.S.C. §§ 3184, 3188; United States v. Saldana, No. 2:09-mj-00014-tmp-1, Oct. 8, 2009 Order Granting Certification of Extraditability and Order of Commitment (Docket #32) at 1. The Order found specifically that the evidence was sufficient to sustain the charge of aggravated homicide against petitioner.

Petitioner did not collaterally attack the certification via habeas review of the Order but instead asked the Secretary of State, by letter dated October 21, 2009, to deny extradition and surrender on humanitarian grounds, based upon the United States' obligations under the CAT, the FARR Act, and regulations implementing those provisions. Specifically, petitioner alleges that he fears for his life and safety in Mexican jails and prisons, that he will not receive a fair trial, that "he would be tortured and otherwise subject to unfair and inhumane treatment if extradited to Mexico, and that any decision to extradite him in the face of such evidence would be arbitrary, capricious and contrary to law." United States v. Saldana, No. 2:09-mj-00014-tmp-1, October 21, 2009 letter from Federal Public Defender to Hon. Hillary Clinton (Docket #33).

After fully considering petitioner's claims, the Department of State issued a surrender warrant on December 3, 2009, directing that petitioner be released to Mexican authorities by December 8, 2009. On the eve of his surrender, petitioner filed a petition for writ of habeas corpus as well as a motion to stay his extradition, and on December 23, 2009, he filed an amended petition for writ of habeas corpus. The amended petition, citing the CAT, the FARR Act, the Administrative Procedure Act ("APA"), and regulations thereunder, does not challenge

the certification order, but instead seeks judicial review of the Secretary of State's decision on surrender. Petitioner alleges that the decision to extradite was arbitrary and capricious in contravention of the Administrative Procedure Act because there are substantial grounds to believe that petitioner will be tortured upon his surrender. Amended Petition at 3. This allegation is based upon alleged evidence of continuing patterns of torture in Mexican prisons and in the Mexican state where petitioner would be tried, as well as alleged human rights violations currently occurring in Mexico. Id. Petitioner also claims that he was denied a full and fair hearing with the Department of State in violation of his right to procedural due process. Id. Finally, petitioner alleges that he was never given an opportunity for notice and a hearing to present evidence before the Secretary of State prior to her decision to surrender him, in violation of petitioner's right to substantive due process. Id.

For the reasons stated below, the Court should dismiss the amended petition for writ of habeas corpus.

ARGUMENT

I. The REAL ID Act Precludes Judicial Review of CAT Claims in The Habeas Context

The REAL ID Act, 8 U.S.C. § 1252(a)(4), requires the dismissal of petitioner's habeas petition opposing the Secretary's extradition determination on grounds that petitioner is more likely than not to face torture. The Act unambiguously provides that "the sole and exclusive means for judicial review of any cause or claim under the [CAT]" is the filing in a court of appeals of a petition for review challenging a final order of removal.[5] 8 U.S.C. § 1252(a)(4)

[5] The REAL ID Act does contain a statutory exception – not applicable here – for certain limited expedited removal challenges under "subsection (e)" of 8 U.S.C. § 1252 (pertaining to aliens seeking to immigrate).

(emphasis added); see 8 U.S.C. § 1252(a)(1) (providing review of a "final order of removal"). Congress could not have used more explicit and emphatic terms to show its intention to provide only a single, exclusive forum for the judicial review of any cause or claim under the CAT. Since the sole means for review of a CAT claim is in the court of appeals upon review of a final order of removal, the clear language of the REAL ID Act necessarily precludes review of a CAT claim under habeas law in connection with an extradition decision. See Kiyemba v. Obama, 561 F.3d 509, 514 (D.C. Cir. 2009) (finding that, pursuant to the REAL ID Act, 8 U.S.C. § 1252(a)(4), jurisdiction over torture claims exists exclusively in the court of appeals in connection with immigration proceedings); Hamid v. Gonzales, 417 F.3d 642, 647 (7th Cir. 2005) (stating that the REAL ID Act "abolishes habeas review of CAT claims, providing that a petition for review filed with the appropriate court of appeals is (with an irrelevant exception) 'the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture.' . . . 8 U.S.C. § 1252(a)(4) . . . .").

Furthermore, this limitation on jurisdiction exists "notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision." In other words, Congress intended to "override[]" any potentially conflicting law. Dean v. Veterans Admin. Regional Office, 943 F.3d 667, 670 (6th Cir. 1991), vacated and remanded on other grounds, 503 U.S. 902 (1992); see Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18 (1993) ("[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section."). The fact that Congress specifically singled out habeas corpus as not being an instance where jurisdiction exists signals its particular intent that there be no jurisdiction over CAT claims

in the habeas context, an approach consistent with the FARR Act, which similarly provides no jurisdiction over CAT claims except in the immigration context. Congress also explicitly indicated that the REAL ID Act was intended to supersede statutory and nonstatutory law, and that it therefore preempts contrary judicial decisions allowing for jurisdiction over CAT claims outside the specified removal context.[6] Thus, under the plain language of the REAL ID Act, a CAT claim cannot properly be raised under "section 2241 of Title 28, or any other habeas corpus provision," as petitioner has done here.

II. The Principles of Munaf Reinforce the Rule of Non-Inquiry and Preclude Judicial Review of the Secretary's Decision to Extradite Petitioner

As the plain language of the REAL ID Act shows, Congress unequivocally intended to limit jurisdiction over CAT claims to the court of appeals in a particular immigration context. Jurisdiction therefore does not exist over the instant habeas petition, and the Court's inquiry should end there. Notwithstanding the REAL ID Act, however, the principles enunciated in Munaf, reinforcing the longstanding principles underlying the Rule of Non-Inquiry, also preclude judicial review of the Secretary's extradition decision. Once a court has determined that a fugitive is extraditable under the relevant treaty and the applicable U.S. law, 18 U.S.C. § 3184, the process moves into the foreign affairs arena, and authority over its pursuit shifts entirely to the Executive Branch. 18 U.S.C. § 3186. At that stage, the Secretary of State exercises her discretion to decide whether, and under what circumstances, a fugitive should be returned to the requesting country. Kin-Hong, 110 F.3d at 110-111; Ahmed, 910 F.2d at 1066-67. The statutory

[6] This would include Cornejo-Barreto v. Seifert, 218 F.3d 1004 (9th Cir. 2000), and Prasoprat v. Benov, 622 F. Supp. 2d 980 (C.D. Cal. 2009), cited by petitioner. See Amended Petition at 1; Petition at 8-9.

commitment of this decision to the Secretary's discretion reflects a recognition that the decision necessarily involves the application of particular expertise that is not available in the Judiciary and sensitive foreign relations considerations that are not amenable to review. Escobedo, 623 F.2d at 1105.

As stated in Munaf, in contrast to the Judiciary, "the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally." 128 S. Ct. at 2226. Therefore, a court should proceed with circumspection when "adjudicating issues inevitably entangled in the conduct of our international relations." Id. at 2218; see Hoxha v. Levi, 465 F.3d at 563 ("The non-inquiry principle serves interests of international comity by relegating to political actors the sensitive foreign policy judgments that are often involved in the question of whether to refuse an extradition request."); Blaxland, 323 F.3d at 1208 ("Unwarranted expansion of judicial oversight may interfere with foreign policy and threaten the ethos of the extradition system."); Kin-Hong, 110 F.3d at 110 (stating that the bifurcated procedure reflects the fact that "extradition proceedings . . . implicate questions of foreign policy, which are better answered by the executive branch").

Judicial review of the Secretary's decision would place the Court in an unfamiliar and inappropriate position. For example, if the Secretary accepted the assurance of a foreign government that, despite a history of human rights abuses in that country, a fugitive would not be tortured, and on that basis concluded, consistent with the FARR Act and the CAT, that it was not more likely than not that the fugitive would be tortured, a court could evaluate that decision only by second-guessing the expert opinion of the Department of State that such an assurance can be trusted. See Johnson Dec. ¶ 9. It is difficult to contemplate how judges would reliably make

such a prediction, lacking any ability to communicate with the foreign country or to weigh the situation there with resources and expertise comparable to those of the Department of State. See Munaf, 128 S. Ct. at 2226; see Johnson Dec. ¶¶ 13-14.

Moreover, only the Secretary of State has the diplomatic tools at her disposal for protecting a fugitive or assuring humane treatment upon his return. See Johnson Dec. ¶¶ 8-10; Munaf, 128 S. Ct. at 2225; Kin-Hong, 110 F.3d at 110. With respect to torture claims such as those raised here, the Secretary has three options: "to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions." 22 C.F.R. § 95.3(b); Johnson Dec. ¶ 8. The Secretary may decline to surrender the fugitive "on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations." Kin-Hong, 110 F.3d at 109; see also Munaf, 128 S. Ct. at 2226. In the same vein, the Secretary may attach conditions to the surrender of the fugitive, id. at 110, such as demanding that the requesting country provide assurances regarding the individual's treatment. Johnson Dec. ¶ 8; see Munaf, 128 S. Ct. at 2226 (noting Solicitor General's explanation that determinations regarding torture are based on the Executive's ability to obtain foreign assurances it considers reliable); Jimenez v. United States District Court, 84 S. Ct. 14, 19, 11 L. Ed. 2d 30 (1963) (describing commitments made by foreign government to Department of State as a condition of surrender) (Goldberg, J., in chambers); Kin-Hong, 110 F.3d at 110 (stating that the Secretary may also elect to use diplomatic methods to obtain fair treatment for the relator").

Application of the Rule of Non-Inquiry here makes perfect sense in light of the factors involved in extradition determinations and the inherent limits on the ability of courts to adjudicate issues intimately tied in with foreign relations. See Munaf, 128 S. Ct. at 2218. The

Secretary of State, not the Court, has the responsibility to ensure that all extraditions are legally carried out. In other words, "[i]t is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed." Kin-Hong, 110 F.3d at 111; see Munaf, 128 S. Ct. at 2225-26. Petitioner's argument assumes the Secretary will seek to extradite someone to face torture, but petitioner cites no example of such an action having ever occurred nor any reason to believe the Secretary would ever want to do so (in violation of the Department's own regulations). On the contrary, the courts have long recognized the presumption that the decisions of government officials are made in good faith. United States v. Chemical Found., 272 U.S. 1, 14-15 (1926); see also Jennings v. Mansfield, 509 F.3d 1362, 1367 (Fed. Cir. 2007).

Cornejo- Barretto v. Seifert, 218 F.3d 1004 (9th Cir. 2000), cited by petitioner, Amended Petition at 1, is not binding on this Court, and to the extent the decision ever was valid authority, it has been superseded.[7] In Cornejo, a Ninth Circuit panel dismissed a fugitive's habeas petition as unripe because the Secretary of State had not yet determined whether to surrender the fugitive to Mexico. Cornejo, 218 F.3d at 1016. However, the panel majority went on to state that, if the Secretary should later decide in favor of surrender, Cornejo-Barreto would be able to file a new habeas action in district court, challenging the validity of the Secretary's decision in relation to the FARR Act under the APA. Id. at 1009 n.5, 1016-17. Cornejo has been overtaken by the REAL ID Act and by the analysis in Munaf reinforcing the Rule of Non-Inquiry, under which the

[7] Because the relevant portions of the decision are dicta, they are not even binding on the Ninth Circuit. See Hoxha v. Levi, 465 F.3d at 565 n.16 (noting that Cornejo is not binding precedent in the Ninth Circuit).

courts lack jurisdiction to consider humanitarian arguments against extradition, which are well-established as within the exclusive province of the Executive Branch. No Court of Appeals has expressly adopted the panel majority's analysis in Cornejo. See, e.g., Mironescu v. Costner, 480 F.3d at 674 (noting that in reaching its conclusion that the FARR Act permits review of CAT claims, the Ninth Circuit in Cornejo failed to discuss whether the relevant language in § 2242(d) constitutes such a preclusion). The decision carries no weight here.

III. Neither the CAT Nor the FARR Act Overturns the Rule of Non-Inquiry So As To Provide for Judicial Review

Petitioner contends that Article 3 of the CAT prohibits the extradition of a person who is likely to be tortured, and suggests that the FARR Act creates a mandatory duty on the part of the Secretary of State to implement that prohibition. Petition at 3-4. Neither of those documents, however, allows the courts to make determinations, exclusively within the province of the Department of State, regarding whether a fugitive is likely to be subject to torture after extradition.

A. As a Non-Self-Executing Treaty, the CAT Itself Confers No Right To Judicial Review

The CAT is not self-executing and therefore, in the absence of implementing legislation, it creates no judicially enforceable rights in the context of extradition. Courts addressing the issue have uniformly held that the CAT is not self-executing. See Mironescu v. Costner, 480 F.3d at 677 n.15; Raffington v. Cangemi, 399 F.3d 900, 903 (8th Cir. 2005); Auguste v. Ridge, 395 F.3d at 132-33 & n.7; Kay v. Ashcroft, 387 F.3d 664, 671 n.7 (7th Cir. 2004); Reyes-Sanchez v. Attorney General, 369 F.3d 1239, 1240 n.1 (11th Cir. 2004); Castellano-Chacon v. INS, 341 F.3d 533, 551 (6th Cir. 2003); Saint Fort v. Ashcroft, 329 F.3d 191, 202 (1st

Cir. 2003); Wang v. Ashcroft, 320 F.3d 130, 140 (2d Cir. 2003); Khalid v. Bush, 355 F. Supp. 2d 311, 327 (D.D.C. 2005). This conclusion is supported by the fact that the United States Senate conditioned its advice and consent to ratification of the CAT on a declaration that Article 3 was "not self-executing," 136 Cong. Rec. S17486-01, S17491-92 (Oct. 27, 1990); S. Exec. Rep. No. 101-20, at 31 (1990). As the Executive Branch explained, in a statement included in the Senate's report on the CAT, because the CAT is not self-executing, extradition determinations by the Executive Branch "will not be subject to judicial review in domestic courts." S. Exec. Rep. No. 101-30, at 17-18.

A non-self-executing treaty such as the CAT does not confer any judicially enforceable rights upon a private party. Whitney v. Robertson, 124 U.S. 190, 194 (1888) (holding that if a treaty's "stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect"); Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004) (holding that a treaty that is not self-executing does not create obligations enforceable in the federal courts, even when, by its terms, that treaty protects individual civil rights); Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283 (9th Cir. 1985) (indicating that a non-self-executing agreement is merely an agreement between nations with no effect on domestic law absent additional governmental action). The CAT therefore does not itself enable the review of extradition determinations made by the Secretary of State.

B. The FARR Act Explicitly Does Not Create New Avenues of Judicial Review For Extradition Decisions

Neither does the FARR Act provide jurisdiction for a court to review the Secretary's application of Article 3 of the CAT. The text of the FARR Act contradicts any notion that

Congress intended to radically alter the law and abruptly create judicial review of extradition determinations by the Secretary of State. To the contrary, as described earlier, the FARR Act states: "[N]otwithstanding any other provision of law . . . nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the [CAT] or this section . . . except as part of the review of a final order of removal [in immigration cases]." 8 U.S.C. § 1231 note, Sec. 2242(d).

This clear textual statement establishes that, by passing this statute, Congress did not intend to abolish the Rule of Non-Inquiry and provide judicial review through the FARR Act. See also H.R. Conf. Rep. No. 105-432, at 150 (1998) ("The provision agreed to by the conferees does not permit for judicial review of the regulations or of most claims under the Convention"). Rather, as Munaf explained, the FARR Act expressly limits jurisdiction over CAT claims to review of final immigration removal orders. See Munaf, 128 S. Ct. at 2226 n.6; see also Mironescu, 480 F.3d at 672; Al-Anazi v. Bush, 370 F. Supp. 2d 188, 194 (D.D.C. 2005); 8 U.S.C. § 1252(a)(4) (CAT claims are not cognizable in a habeas petition). No such removal order is at issue here.

In addition, the regulations promulgated by the Department of State under the express authority of the FARR Act firmly support the proposition that nothing in the FARR Act established a new right to judicial review of extradition decisions. On their face, these regulations state that there is no judicial review of the Secretary's extradition decisions. See 22 C.F.R. § 95.4 ("[N]otwithstanding any other provision of law . . . nothing in section 2242 shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or section 2242, or any other determination made with respect to the application of

the policy set forth in section 2242(a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252), which is not applicable to extradition proceedings."). Especially in light of Congress's explicit delegation to the Secretary of authority to "implement" the obligations of the United States under the CAT, these regulations deserve substantial deference as published agency interpretations of the FARR Act. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (where there has been a Congressional delegation of administrative authority, courts must defer to reasonable agency interpretation). Consequently, it is manifest that the FARR Act itself precludes jurisdiction to review extradition determinations when they include considerations of issues of torture.

In conclusion, at virtually every stage of relevant Congressional actions, from the enactment of REAL ID Act, to the approval of the CAT and enactment of the FARR Act, to the delegation of unreviewable rulemaking authority to the Secretary of State, Congress took pains to reinforce the concept that the United States' obligations under the CAT in extradition cases – though serious and important – are not to be enforceable in court.

IV. The Administrative Procedure Act Provides No Basis for Reviewing the Secretary's Extradition Decision

Petitioner contends that this Court has jurisdiction to review the Secretary's extradition decision pursuant to the APA, 5 U.S.C. §§ 701-06. Amended Petition at 1, 3; Petition at 9. That statute waives the government's immunity from certain suits challenging administrative agency action and seeking relief other than money damages. 5 U.S.C. § 702. It provides that a reviewing court may "hold unlawful and set aside agency action, findings, and conclusions found

to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A). The APA provides no authority for judicial review here.

The APA does not apply so as to waive sovereign immunity from suit to the extent that "statutes preclude judicial review," 5 U.S.C. § 701(a)(1). The REAL ID Act expressly precludes judicial review of CAT claims except (with one irrelevant exception) for those asserted in a petition for review of a final order of removal in an immigration proceeding. 8 U.S.C. § 1252(a)(4) ("[A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claims under the [CAT] . . . ."). This preclusion applies "notwithstanding any other provision of law." Id. (emphasis added). It therefore applies notwithstanding the APA and precludes judicial review of petitioner's CAT claim asserted under the APA. The courts' repeated application of the Rule of Non-Inquiry also constitutes a "judicial history" which forecloses review of determinations by the Secretary under 18 U.S.C. § 3186 regarding the treatment of a fugitive after extradition. See Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1984) (APA review is foreclosed by virtue of "the collective import of legislative and judicial history behind a particular statute [or] by inferences of intent drawn from the statutory scheme as a whole").

In addition, review of petitioner's claim in this case is precluded under 5 U.S.C. § 702(1), which states that the APA's judicial review provision does not affect "other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." This provision incorporates not only express preclusions of judicial review, but also implied preclusions regarding foreign affairs matters such as extradition decisions, which are exclusively entrusted to the political branches of government.

See Saavedra Bruno v. Albright, 197 F.3d 1153, 1158-59 (D.C. Cir. 1999) (finding consular visa decisions to be interwoven with foreign relations, inter alia, and therefore largely immune from judicial review pursuant to 5 U.S.C. § 702(1)); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) (determining that it would be an abuse of discretion to grant relief under the APA where the court would be required to intercede in sensitive foreign affairs matters).

Finally, APA review of the Secretary of State's extradition determinations under 18 U.S.C. § 3186 is also barred because those decisions are "committed to agency discretion." 5 U.S.C. § 701(a)(2); see Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (stating that section 701(a)(2) covers matters that have been "traditionally left to agency discretion"). As discussed above, the language of § 3186 is quintessentially discretionary – the Secretary may surrender a person committed for extradition. This means that the ultimate decision whether to extradite a fugitive rests "exclusive[ly]" with the Secretary of State. Ahmad, 910 F.2d 1066. The FARR Act does nothing to change this. Similarly, the regulations implementing the FARR Act oblige the United States to refuse extradition if the "competent authorities," i.e., the Secretary of State, taking into account "all relevant considerations," determine that it is more likely than not that a fugitive would be tortured if extradited. See 22 C.F.R. § 95.2. Such a standard "fairly exudes deference" to the decisionmaker, Webster v. Doe, 486 U.S. 592, 600 (1988), and indicates that the statute's implementation was committed to agency discretion by law. Therefore, petitioner has no right to judicial review under 5 U.S.C. § 701(a)(2) or any other provision of the APA.[8]

[8] The APA was initially enacted in 1946. See Act of June 11, 1946, ch. 324, § 10(a), 60 Stat. 243 (1946). Nevertheless, much of the case law establishing and explaining the Rule of Non-Inquiry was decided after that year. If the APA had provided a basis for judicial review of the Secretary's extradition determinations, all of the cases on the Rule of Non-Inquiry that were decided after 1946 would have been in error. As the Supreme Court has written, courts should

V. Petitioner's Procedural Due Process Claim Is Without Merit

Petitioner alleges that he was wrongly denied a hearing regarding the Secretary's decision to extradite him. Amended Petition at 3. Petitioner is not entitled to a hearing. However, he was free to submit whatever information he deemed relevant to the Secretary, who "is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition." Id. § 95.2(b). In extradition cases where allegations regarding torture have been made, "appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant." Id. § 95.3(a). The information considered includes materials submitted by petitioner, persons acting on his behalf, or other interested parties. Johnson Dec. ¶ 7. Thereafter, "[b]ased on the resulting analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions." Id. § 95.3(b). Petitioner did in fact tender some information to the Secretary, see USA v. Saldana, No. 2:09-mj-00014-tmp-1, October 21, 2009 letter from Federal Public Defender to Hon. Hillary Clinton (Docket #33), and such information is considered by the Secretary in making her decision, see Johnson Dec. ¶ 7. Petitioner therefore received all the process that was due.

Furthermore, as respondents have shown, the question whether a fugitive shall actually be surrendered to the custody of the requesting state during this phase of the extradition process is committed to the exclusive discretion of the Secretary of State, 18 U.S.C. § 3186, and is a matter

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be very skeptical of arguments for the "sudden discovery" of "new, revolutionary meaning in reading an old judiciary enactment." Romero v. International Terminal Operating Co., 358 U.S. 354, 370 (1959).

of foreign policy, see Hoxha, 465 F.3d at 563. The Secretary's decision whether to extradite may therefore "be based not only on 'considerations individual to the person facing extradition,' but 'may be based on foreign policy considerations instead.'" Prasoprat, 421 F.3d at 1016 (quoting Lopez-Smith, 121 F.3d at 1326). In determining whether or not to extradite, the Secretary takes into account humanitarian claims and applicable statutes, treaties, or policies regarding appropriate treatment in the receiving country. See Ntakirutimana v. Reno, 184 F. 3d at 430. She also considers the likely treatment of the individual if he were to be returned. Johnson Dec. ¶ 3. There is no requirement that the Secretary provide petitioner a hearing, nor is a hearing necessary or appropriate. See Lopez-Smith, 121 F.3d at 1326; cf. Escobedo v. United States, 623 F.2d at 1104-06 (reaffirming Secretary's discretion on extradition decisions, and citing rejection by Fourth Circuit of claim that due process required the Secretary to provide a hearing).

VI. Petitioner's Substantive Due Process Claim Is Without Merit

Petitioner's substantive due process claim is based on the erroneous assumption that the Secretary has decided to extradite him despite an alleged likelihood of torture. Amended Petition at 3. However, in conformance with the FARR Act and Department of State regulations, the Secretary decided to extradite petitioner only after determining that it is not more likely than not that he would be tortured. See Johnson Dec. ¶¶ 3, 5, 8. This decision took into account the recommendation of appropriate policy and legal offices within the Department of State that had reviewed and analyzed information relevant to petitioner's case. See 22 C.F.R. § 95.3(a); Johnson Dec. ¶¶ 6-10. Therefore, there is no merit to petitioner's claim that defendant has violated his substantive due process rights by making torture at the hands of third parties more likely.

CONCLUSION

Accordingly, the first amended petition for writ of habeas corpus should be denied and dismissed.

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CERTIFICATE OF SERVICE

I, Lisa A. Olson, hereby certify that on December 30, 2009, a copy of the foregoing Motion to Dismiss First Amended Petition for Writ of Habeas Corpus and Supporting Memorandum has been sent via the district court's electronic filing system to the counsel for the Petitioner.

/s/ Lisa A. Olson
LISA A. OLSON